Supreme Court, U. S.
FILED
MAY 27 1977

No. 76-1378

In the Supreme Court of the United States

OCTOBER TERM, 1976

ROGER L. WHITESEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner argues that the trial court should have permitted him to be represented by an accountant at his trial for failure to file tax returns and for filing false withholding information with his employer.

After a jury trial in the United States District Court for the Southern District of Ohio, petitioner was convicted on two counts of willfully failing to file income tax returns for 1972 and 1973, in violation of 26 U.S.C. 7203; two counts of willfully failing to supply information for the same years, in violation of 26 U.S.C. 7203; and one count of filing a false Exemption from Withholding Certificate with his employer, in violation of 26 U.S.C. 7205 (App. 1-4).[1] The district court sentenced him

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[1] "App." refers to the appendix filed in the court of appeals.

to two years' imprisonment and fined him $1,500 (Pet. App. 1). The court of appeals affirmed the convictions for failure to file returns and for filing a false withholding certificate, but vacated the judgments and sentences with respect to the charges of willful failure to supply information on the ground that those offenses had been merged into the convictions for failure to file (Pet. App. 8, 10). The judgment of the court of appeals reduced petitioner's fine to $1,000 but had no effect on the prison sentences, which had been imposed concurrently (App. 5).

The evidence showed that for 1972 petitioner filed a tax return form giving no financial information but stating "I plead the Fourth and Fifth Amendments and the United States Constitution" (Pet. App. 2). Petitioner likewise provided no financial information for 1973 but stated on the form "Object, see attachments," and submitted 170 pages of material protesting the income tax system. In August 1972, petitioner filed with his employer an Exemption from Withholding Certificate in which he stated that he had incurred no liability for a federal income tax for 1971 and anticipated incurring none for 1972. Forms W-2 introduced in evidence showed that petitioner's gross wages for 1971, 1972, and 1973, respectively, were $16,634, $19,403, and $19,868 (Pet. App. 2).

1. Petitioner contends (Pet. 13-24) that the trial court improperly refused to allow him to be represented by an accountant rather than an attorney. But it is well settled that a criminal defendant's right to counsel does not include the right of assistance or representation by a lay person. *United States* v. *Cooper*, 493 F. 2d 473, 474 (C.A. 5), certiorari denied, 419 U.S. 859; *United States* v. *Ellsworth*, 547 F. 2d 1096 (C.A. 9), pending

on petition for a writ of certiorari, No. 76-6323; *United States* v. *Jordan*, 508 F. 2d 750 (C.A. 7), certiorari denied, 423 U.S. 842.[2]

2. Petitioner further argues (Pet. 25-45) that the trial court should have required the government to make a pretrial election between the charges of failure to file and failure to supply information. But petitioner was not prejudiced by the inclusion of both of these charges in the indictment because the court of appeals vacated the judgments and sentences with respect to the counts alleging failure to supply information on the ground that they were merged into the convictions for failure to file (see Pet. App. 8, 10). As the court pointed out, "Counts 1 and 3, and 2 and 4 charge much the same offense and would be established by the same proofs" (Pet. App. 8). Since its review of the record confirmed that the proof showed failure to file, the court of appeals properly vacated petitioner's conviction for failure to supply information.[3]

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[2]The court of appeals held that in certain extraordinary situations a qualified person other than an attorney at law might be permitted to represent a criminal defendant (Pet. App. 7-8). But the court went on to point out that the accountant in question had had no legal training and was therefore not qualified to represent petitioner, although it permitted the accountant to sit at the counsel table and advise petitioner throughout the trial (Pet. App 8).

[3]Petitioner also argues (Pet. 56-57, 60-63) that the amount of his tax liability in connection with the failure to file charge was "a material fact for the Jury to determine" and that the government should have determined his civil liability before prosecuting him for failure to file. But this Court has held that the existence of a tax liability is not an essential element of the offense of willfully failing to file an income tax return. See *Spies* v. *United States*, 317 U.S. 492, 495-496. Moreover, it has long been settled that a determination of a deficiency is not a prerequisite to a criminal tax prosecution. See, *e.g.*, *Guzik* v. *United States*, 54 F.

3. Contrary to petitioner's final argument (Pet. 64-76), the trial court's instructions do not conflict with either *United States* v. *Bishop*, 412 U.S. 346, or *Garner* v. *United States*, 424 U.S. 648. The court correctly charged (App. 86; Pet. 72-73) that the constitutionality of the income tax laws consistently has been upheld. It also properly instructed the jury (App. 87; Pet. 72) that "[a] taxpayer's return which does not contain any information relating to his income, deductions * * * from which a tax can be computed is not a return within the meaning of the law." *United States* v. *Daly*, 481 F. 2d 28, 29 (C.A. 8), certiorari denied, 414 U.S. 1064; *United States* v. *Porth*, 426 F. 2d 519, 523 (C.A. 10), certiorari denied, 400 U.S. 824.

Petitioner claims (Pet. 66) that the trial court erred in charging that "[i]f a person knows what he is saying is false, and it is not correct in fact, and says it intending for another person to act on it, all the good faith in the world can't make what is false in fact true." This instruction was proper. *United States* v. *Pomponio*, No.

2d 618, 619 (C.A. 7), certiorari denied, 285 U.S. 545; *United States* v. *Commerford*, 64 F. 2d 28, 30 (C.A. 2), certiorari denied, 289 U.S. 759.

Petitioner further claims (Pet. 58-59) that the conviction for filing a false withholding certificate should be reversed because the trial court held that the existence of a tax liability was not a material element of that offense. However, the evidence showed that when petitioner filed the Exemption from Withholding Certificate (see 26 U.S.C. 7205) he falsely stated that he had incurred no income tax liability for 1971 and expected to incur none for 1972 (App. 9, 49); the W-2 forms petitioner received from his employer showed a gross income of $16,634 for 1971 and $19,403 for 1972 (App. 62; Pet. App. 2). Moreover, the trial court instructed the jury that in order to convict on this count it must find that petitioner had willfully made a false statement regarding his tax liability for one of those years (App. 91).

75-1667, decided October 12, 1976. The purport of this instruction was simply that if petitioner did not willfully falsify the certificate he could not be convicted, but if he did willfully falsify he could not have acted in good faith. The court further advised the jury that in order to convict on this count, it had to find that petitioner "knew the requirement of telling the truth and intentionally and with a bad purpose didn't tell the truth * * * *" (App. 91). If anything, these instructions, with their emphasis on "bad purposes," were unnecessarily favorable to petitioner. See *United States* v. *Pomponio*, *supra*.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

DANIEL M. FRIEDMAN,
*Acting Solicitor General.**

MAY 1977.

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*The Solicitor General is disqualified in this case.

DOJ-1977-05